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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

HEIDI CISSNA,

Plaintiff,

v.

**JO ANNE B. BARNHART, Commissioner of
Social Security,**

Defendant.

Case No. 01-2550-JAR

MEMORANDUM & ORDER

Plaintiff Heidi Cissna brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of Defendant Commissioner of Social Security's denial of her application for a period of disability and disability insurance benefits under Title II of the Social Security Act. According to plaintiff, defendant failed to properly assess her subjective complaints of pain, failed to accord adequate weight to the opinion of her treating physician, and failed to establish that plaintiff could perform other jobs despite her limitations. As explained in more detail below, the Court rejects each of plaintiff's arguments and affirms defendant's decision.

I. Procedural Background

On October 21, 1999, plaintiff filed her application for a period of disability and disability insurance benefits, claiming disability since February 15, 1998¹ due to bilateral hip replacements. The

¹While plaintiff alleged in her application an onset date of February 3, 1997, she amended her alleged onset date at the hearing before the ALJ.

application was denied both initially and upon reconsideration. At plaintiff's request, an administrative law judge ("ALJ") held a hearing on November 6, 2000, at which both plaintiff and her counsel were present. On March 19, 2001, the ALJ rendered a decision denying all benefits, on the basis that plaintiff was not under a "disability" as defined by the Social Security Act. After the ALJ's unfavorable decision, plaintiff requested review by the Appeals Council; her request for review was denied on September 21, 2001. Thus, the ALJ's decision is the final decision of defendant.

II. Standard of Review

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant's decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.² The Tenth Circuit has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³ In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.⁴

III. Relevant Framework for Analyzing Claim of Disability and the ALJ's Findings

"Disability" is defined in the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment"⁵ The Social Security Act further provides that an individual "shall be determined to be under a disability only

²See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

³*Id.* (quoting *Castellano*, 26 F.3d at 1028).

⁴ *Id.*

⁵*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy”⁶

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,⁷ and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.⁸ Step one determines whether the claimant is presently engaged in substantial gainful activity.⁹ If she is, disability benefits are denied.¹⁰ If she is not, the decision maker must proceed to the second step.¹¹ Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has a medically severe impairment or combination of impairments.”¹² This determination is governed by certain “severity regulations,” is based on medical factors alone, and, consequently, does not include consideration of such vocational factors as age, education, and work experience.¹³ Pursuant to the severity regulations, the claimant must make a threshold showing that her medically determinable

⁶*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

⁷*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. 2287, 2291 (1987)).

¹³ *Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

impairment or combination of impairments significantly limits her ability to do basic work activities.¹⁴ If the claimant is unable to show that her impairments would have more than a minimal effect on her ability to do basic work activities, she is not eligible for disability benefits.¹⁵ If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the decision maker proceeds to step three.¹⁶ The ALJ in this case concluded that plaintiff's bilateral hip replacements satisfied the severity requirement and, thus, the ALJ proceeded to step three.

In step three, the ALJ "determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity."¹⁷ If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.¹⁸ If not, the evaluation proceeds to the fourth step, where the claimant must show that the "impairment prevents [the claimant] from performing work he has performed in the past."¹⁹ If the claimant is able to perform her previous work, she is not disabled.²⁰ With respect to the third step of the process in this case, the ALJ determined that plaintiff's impairments were not listed or medically equivalent to those listed in the relevant regulations. At the fourth step, the ALJ concluded that plaintiff was unable to perform past relevant work.

Thus, the ALJ proceeded to the fifth and final step of the sequential evaluation

¹⁴*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

¹⁵*Id.* at 751.

¹⁶*Id.*

¹⁷*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

¹⁸*Id.*

¹⁹*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

²⁰*Id.*

process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of [her] age, education, and work experience.”²¹ At that point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”²² At this step, the ALJ concluded that plaintiff was not disabled, a conclusion that rested on a finding that plaintiff, despite possessing certain physical limitations due to her hip replacements, nonetheless could perform a significant number of jobs in the state and national economies, including performing light work as a small bench assembler or gatekeeper or sedentary work as a telephone solicitor, information clerk, or electronics assembler.

IV. Analysis of Plaintiff’s Specific Arguments

In her motion, plaintiff contends that the ALJ made three errors in reaching his decision: (a) defendant failed to assess properly plaintiff’s subjective complaints of pain; (b) failed to accord adequate weight to the opinion of plaintiff’s treating physician; and (c) failed to satisfy his burden of proving that plaintiff can perform other jobs which exist in significant numbers in the national economy. The court addresses each of these arguments in turn.

A. Assessment of Plaintiff’s Credibility

Plaintiff asserts that the ALJ committed error by failing to assess properly her credibility in accordance with the Tenth Circuit’s opinion in *Luna v. Bowen*.²³ Under *Luna*, the ALJ must decide

²¹See *id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. at 2291).

²²See *id.* (citations omitted); accord *White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

²³834 F.2d 161 (10th Cir. 1987).

whether a claimant's subjective claims of pain are credible, considering such factors as a claimant's persistent attempts to find relief for her pain and her willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.²⁴ Moreover, the ALJ must give specific reasons why he or she rejects a claimant's subjective complaints of pain.²⁵ Ultimately, credibility determinations "are peculiarly the province of the finder of fact," and should not be upset if supported by substantial evidence.²⁶

A review of the ALJ's decision in this case reveals that he complied with *Luna* in assessing plaintiff's credibility. In that regard, the ALJ concluded that plaintiff's allegations concerning her symptoms and her functional limitations were "not credible to the extent she would be considered wholly precluded from work." The ALJ's assessment was based on several specific factors, including plaintiff's concession that her daily activities include cooking, washing dishes and driving; that she typically obtains relief from her pain through the use of over-the-counter analgesics; and that she has seldom sought physician intervention for her pain. The ALJ also noted that although plaintiff testified that she uses a cane to ambulate, the medical evidence established that a cane was no longer medically necessary.

Plaintiff has not shown how this assessment was in error. Indeed, the vast majority of plaintiff's argument concerning the ALJ's assessment of plaintiff's credibility is dedicated to explaining how plaintiff has satisfied the first two prongs of *Luna*—demonstrating a pain-producing impairment and demonstrating that the impairment is one that could reasonably produce the pain alleged. However,

²⁴*Barnett v. Apfel*, 231 F.3d 687, 690 (10th Cir. 2000) (citing *Luna*, 834 F.2d at 165-66).

²⁵*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

²⁶*Id.* (citing *Kepler*, 68 F.3d at 390-91).

because the ALJ discussed only the third prong in his decision—the credibility of subjective claims of pain greater than that usually associated with the particular impairment—it is clear that he concluded that plaintiff satisfied the first two prongs of *Luna*.

In short, the ALJ set forth the specific evidence he relied upon, applied the correct legal standards in evaluating plaintiff’s subjective allegations of pain, and his determination on this matter is supported by substantial evidence in the record.

B. Disregarding Dr. Gaddy’s Opinion

In his decision, the ALJ expressly disregarded a November 2000 opinion of Dr. Gaddy, plaintiff’s treating physician. Dr. Gaddy’s opinion was in the form of a narrative letter prepared at the request of plaintiff’s attorney after plaintiff’s follow up visit with Dr. Gaddy—a visit that occurred the week after the hearing before the ALJ. In his letter, Dr. Gaddy stated that plaintiff reported increasing pain in her hips and that such pain increased with activities such as walking, sitting or standing. He further stated that plaintiff reported an inability to walk any great distance and reported the occasional use of crutches and even a wheelchair. Dr. Gaddy concluded in his letter that plaintiff should not be required to perform prolonged sitting or prolonged walking and that she should be able to change positions as needed. He further concluded that plaintiff would not be able to walk or stand for more than 2 hours total in an 8-hour day. The ALJ disregarded Dr. Gaddy’s narrative on the grounds that the opinion was “inconsistent with other substantial evidence of record, including Dr. Gaddy’s own reports” and because his opinion appeared to be “largely based on claimant’s subjective complaints, *e.g.*, Dr. Gaddy states that claimant ‘reports an inability to walk more than 200-300 feet at any time without having to take a rest.’”

The ALJ must give “controlling weight” to the opinion of a treating physician, provided that

opinion is “well-supported and is not inconsistent with other substantial evidence.”²⁷ According to the Tenth Circuit, a treating physician’s opinion is not dispositive on the ultimate issue of disability.²⁸ In addition to its consistency with other evidence, the court examines a treating physician’s opinion with several factors in mind, including the length of the treatment relationship, the frequency of examination, and the extent to which the opinion is supported by objective medical evidence.²⁹ In short, the ALJ cannot disregard a treating physician’s opinion that a claimant is disabled without giving legitimate and specific reasons for doing so.³⁰

The Court finds that the ALJ in this case set forth specific and legitimate reasons for discounting Dr. Gaddy’s November 2000 opinion. As noted by the ALJ, Dr. Gaddy’s November 2000 opinion concerning plaintiff’s limitations was more restrictive than his own prior diagnosis of plaintiff. Dr. Gaddy’s July 1998 treatment notes (5 months after the alleged onset date) indicate that plaintiff was bearing her full weight without an assistive device. Dr. Gaddy’s notes also indicate that plaintiff had a normal gait and excellent range of motion of both her hips from July 1998 onwards, except for a brief period in December 1998 when plaintiff suffered a hamstring strain. In addition, an April 1999 x-ray of plaintiff’s hips revealed no abnormality except for a small exostosis over the wire on the left hip which likely caused trochanteric bursitis. According to Dr. Gaddy’s notes, however, plaintiff’s pain stemming from the bursitis was not severe enough to warrant an injection. Finally, Dr. Gaddy’s April 1999 treatment notes indicate that plaintiff “can perform activity as tolerated” and that he did not need

²⁷ *White*, 271 F.2d at 1259 (quoting 20 C.F.R. § 404.1527(d)(2)).

²⁸ *Id.* (citing *Castellano*, 26 F.3d at 1029).

²⁹ *Id.* (citing 20 C.F.R. § 404.1527(d)(2)).

³⁰ See *Goatcher v. United States Dep’t of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) (citing *Frey v. Bowen*, 816 F.2d 508, 513 (10th Cir. 1987)).

to see plaintiff regarding her left hip until April 2000, and that he did not need to see plaintiff regarding her right hip until April 2001 or even April 2002.

After plaintiff saw Dr. Gaddy in April 1999, she did not see him again until November 2000—just days after the hearing before the ALJ. Moreover, plaintiff did not schedule her November 2000 appointment with Dr. Gaddy because of increased pain or difficulty with her hips. According to plaintiff's testimony, she simply scheduled a routine follow up visit regarding her second hip replacement.

The ALJ also rejected Dr. Gaddy's opinion because it appeared to be based in large part on plaintiff's subjective complaints. As the Tenth Circuit has held, this is an entirely appropriate reason to disregard the opinion of a treating physician.³¹ In short, because Dr. Gaddy's November 2000 opinion is not well-supported, is inconsistent with other substantial evidence in the record, and appears to be based in large part on plaintiff's subjective complaints, the ALJ did not err in rejecting that opinion.

C. Burden of Proving that Plaintiff Can Perform Other Jobs in the National Economy

Plaintiff's final argument is that the ALJ's hypothetical question eliciting the vocational expert's (VE) testimony that there were jobs existing in the national economy that plaintiff remained capable of performing failed to include all of plaintiff's limitations and, thus, the VE's testimony fails to constitute substantial evidence supporting the denial of benefits. A vocational expert's testimony can provide a proper basis for an ALJ's determination where the claimant's impairments are reflected adequately in

³¹See *Boss v. Barnhart*, 2003 WL 21357260, at *3 (10th Cir. June 12, 2003) (rejecting the opinion of a treating physician because it appears to be based on the claimant's subjective complaints is a sufficiently specific and legitimate reason for doing so)(citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir.1994).

the hypothetical inquiries to the expert.³² The ALJ, however, is required to accept and include in the hypothetical question only those limitations supported by the record.³³

According to plaintiff, the ALJ's hypothetical question omitted one of plaintiff's significant limitations—her purported need to lie down twice each week to relieve pressure from her hips. The ALJ's written order indicates that he found that plaintiff had exaggerated her need to lie down and that such a need was inconsistent with the objective medical evidence in the record. In that regard, Dr. Jennifer Finley, who is board certified in physical medicine and rehabilitation, testified at the hearing that plaintiff's purported need to lie down was not documented in the record and that, in Dr. Finley's judgment upon reviewing the record, there existed no medical basis for plaintiff's purported need to lie down. The ALJ's decision to disregard plaintiff's testimony on this point, then, is supported by substantial evidence and, thus, he was not required to include the limitation in his hypothetical questions to the VE.³⁴ Because the ALJ included in his hypothetical questions all of the limitations supported by the record,³⁵ the VE's testimony elicited by those hypothetical questions provided substantial evidence to support the denial of benefits.

Ultimately, the ALJ did ask the VE whether plaintiff would be able to perform other jobs in the state and national economies if she had to lie down twice each week during work. The VE testified that, in her opinion, such a limitation would prevent work activity. While plaintiff attaches some significance

³²*Gay v. Sullivan*, 986 F.2d 1336, 1341 (10th Cir. 1993).

³³*Shepherd v. Apfel*, 184 F.3d 1196, 1203 (10th Cir. 1999).

³⁴ See *Barnett v. Apfel*, 231 F.3d 687, 690 (10th Cir. 2000) (ALJ relied on appropriate factors and committed no error with respect to his assessment of plaintiff's subjective complaints of pain where ALJ noted the paucity of objective medical findings in the record and the claimant's failure to report disabling pain to her physicians).

³⁵ See *Decker v. Chater*, 86 F.3d 953, 955 (10th Cir. 1996),

to this testimony, the ALJ did not err in rejecting this opinion as he ultimately decided that plaintiff's testimony concerning the need to lie down was not credible.³⁶

In sum, having carefully reviewed the record in this case and having considered plaintiff's arguments in light of the record, the Court concludes that substantial evidence supports defendant's decision to deny Ms. Cissna's application for disability benefits and that no deviation from established legal standards occurred.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion for judgment (doc. #8) is **denied** and defendant's decision denying plaintiff disability benefits is affirmed.

IT IS SO ORDERED.

Dated this 9th day of September, 2003, at Topeka, Kansas.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

³⁶See *Barnett*, 231 at 690 (ALJ did not err in rejecting the vocational expert's opinion that plaintiff would be totally disabled if her testimony at the hearing were believed completely, as the record did not establish the limitations described by plaintiff) (citing *Gay v. Sullivan*, 986 F.2d 1336, 1341 (10th Cir. 1993) (approving ALJ's disregard of expert's favorable response to claimant's attorney's hypothetical which required expert to assume unestablished facts)).